



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Case 45 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

LEMISO ARAP KOIMA.....1ST ACCUSED

JOHNCHEBOI LAGAT.....2ND ACCUSED

RULING

LEMISO ARAP KOIMA and JOHN CHEBOI LAGAT are jointly charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 24th January 2004 at Kiptoim Village in Koibatek District of Rift Valley Province, they jointly murdered Kipngok Kiplagat.

After the evidence of five witnesses had been taken by the Hon. Justice Musinga directions were taken that the matter do proceed from where it had reached and it was fixed for hearing on 25th June 2008. On that day Mr. Mugambi, Learned State Counsel, applied for adjournment on the ground that he had no witnesses in court. He said he had informed the investigating officer of the hearing date and has had no word from him as to why the witnesses have not been availed. The defence counsel opposed that application and as there was no reason given for failure to avail the witness I refused to adjourn the case and Mr. Mugambi had no choice but to close the prosecution case. With that, counsel for the Accused asked me to acquit the Accused under Section 306 of the Criminal Procedure Code as the evidence of the five witnesses who had testified did not establish a prima facie case to require him to defend himself.

I have carefully perused the evidence of those five witnesses. They said that on 24th January 2004, there was a circumcision ceremony at the home of Stanley Kimeto, PW2. There was a lot to eat. Meat and *ugali* was in plenty and *busaa* was flowing.

Of the five witnesses who testified only PW1 said that he saw the second Accused hit the deceased with a metal bar on the back of the neck and as the deceased ran out Accused one also hit him with an iron rod on the chest. The other witnesses did not witness that.

That evidence if believed can found a conviction. However, having examined it carefully I am, satisfied that it cannot be relied upon for several reasons:-

1. First and foremost PW1 by his own admission was very drunk at the time he claims he witnessed the assault on the deceased by the Accused persons. He said that he had between 9.00 p.m. and 10.00 p.m. of

that night drunk 5 litres of *busaa*.

2. Before he saw the assault he said he had been thrown out of the house by Accused one because he was too young to sit and drink with his elders. So he witnessed the incident from outside the house.
3. The source of light in the house was from a fire in the house and a kerosene lump. The intensity of that light is not known.
4. This was a one roomed house where there were a total of 14 people. Although we are not given the size of that room I find it difficult to understand how PW1 could have seen the assault of the deceased by the Accused persons.
5. PW3 and PW5 who slept in the same room with the deceased did not witness or hear any commotion in the room. PW5 said he slept somewhere in the room and the deceased slept near the door. He did not witness or hear any commotion in the room. According to him the deceased who had drunk a lot of *changaa* must have died out of sickness.
6. PW2 who had left the house a little earlier that evening returned there at 6.00 a.m. the following morning. He found most of the people awake but the deceased appeared still asleep. It is after her had unsuccessfully tried to wake him up that he realized he was dead.
7. PW1 who had been chased from that house was too drunk to get to his home. After sleeping somewhere on the way he woke up and returned to the house at about 6.00 a.m. the following day and found the ceremony going on. That surprised him when he later learnt that the deceased was dead.

Taking all these factors into account I find that the evidence of PW1 cannot be relied upon. Even if it could be relied on, there being no medical evidence as to the cause of the death of the deceased the charge of murder cannot hold against the Accused persons.

I agree with the defence counsel that a prima facie case has not been established to warrant calling upon the Accused persons to defend themselves. I accordingly acquit them under Section 306 of the Criminal Procedure Code and order that they be set free forthwith unless otherwise lawfully held.

DATED and delivered at Nakuru this 4th day of July 2008.

D. K. MARAGA

JUDGE